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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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THERION INC.,

Civil Action No. 08-5256-TCP-ETB

Plaintiff,

-against-

MEDIA BY DESIGN, INC. d/b/a HEALTH WITH
MAGNETS, DENNIS BACKER, and BLUEHOST
INC.,

Defendants.

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**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT BLUEHOST, INC.'S
MOTION FOR CONTINUANCE AND TO AMEND
BLUEHOST, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant Bluehost, Inc. ("Bluehost") has moved for partial summary judgment, which includes summary judgment on all claims being asserted against Defendant Bluehost, Inc.

INTRODUCTION

Two immunity statutes passed by Congress to preclude the types of claims asserted by Plaintiff in this action have not been raised in Bluehost's Partial Motion for Summary Judgment. For judicial economy purposes, and in order for the Court to

materially consider the pertinent issues and be fully advised as to the applicable law, Defendant Bluehost, Inc. requests that the summary judgment hearing scheduled for March 5, 2010 be continued, and that the Court grant leave to amend Bluehost's Partial Motion for Summary Judgment so that the immunity defenses can be considered at this time.

ARGUMENT

Plaintiff's third claim of relief for misappropriation, fourth claim of relief for unfair competition, and fifth claim of relief for conversion are preempted since immunity is provided to Bluehost, Inc. as a webhost and "interactive computer service" provider pursuant to Section 230 of the Communications Decency Act, 47 U.S.C.A. § 230 (c)(1). It provides as follows:

(c) Protection for "good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Section 230 of the Communications Decency Act, 47 U.S.C.A. § 230 (f)(2) defines an interactive computer service as follows:

(2) The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

These three claims, arising specifically out of the existence of content on Defendant Bluehost, Inc.'s webhosting servers, should be dismissed based upon the immunity provisions afforded interactive service providers. Since there are some complexities related to the exact nuances of each of these claims, it is appropriate for this Court to consider this absolute defense with the benefit of a full briefing on these issues and not simply a diminutive summary. It is likewise appropriate and fair to bring these defenses before the Court only after Plaintiff has been afforded the opportunity to submit a memorandum of points and authorities on the arguments.

With respect to Plaintiff's sixth claim for copyright infringement, the Digital Millennium Act, 17 U.S.C. § 512, provides for immunity to webhosts for the infringement of copyright by its customers. This absolute defense likewise has not been raised or briefed and the Court would benefit from a complete analysis as to Defendant's position that it has immunity under the Act.

CONCLUSION

Defendant Bluehost, Inc. recognizes that it would be inappropriate to file a reply brief and raise, for the first time, new, separate and distinct arguments.

For purposes of judicial economy, and to fully provide the Court with appropriate points, arguments and authorities relating to these defenses, Defendant Bluehost, Inc. moves this Court for entry of an Order permitting an amendment to Bluehost, Inc.'s pending Partial Motion for Summary Judgment, the establishment of a new briefing schedule, and the postponement and rescheduling of the hearing on the Motions for Summary Judgment filed by both Defendant Bluehost, Inc. and the Plaintiff, presently scheduled for March 5, 2010 at 10:30 a.m.

Dated: Mineola, New York
February 24, 2010

/s/
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AFFIDAVIT

The affiant hereby swears and affirms that the foregoing is correct and true to the best of his knowledge and belief.

/s/ John W. Dozier, Jr.
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